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In re application of :
Lelia Cosimbescu et al : DECISION ON
Serial No. 10/662,272 : PETITION
Filed: September 15, 2003 :
For: GREEN ORGANIC LIGHT-EMITTING DIODES

This is a decision on the PETITION UNDER 37 CFR 1.181 FOR ENTRY OF THE AFTER FINAL DECLARATION UNDER RULE 131 filed November 16, 2005.

On October 6, 2005, a final office action was mailed to Applicants. Applicants responded to this office action by filing a 131 declaration attempting to swear behind the applied prior art. The examiner refused entry of the declaration based on untimeliness.

On December 12, 2005, the instant petition under 37 CFR 1.181 was timely filed to request the entry of the after final declaration of November 16, 2005.

Petitioner's position is that the appropriate requirements have been satisfied by applicants and that the declaration should be considered.

DECISION

Section 715.09 of the MPEP concerning Rule 131 declarations states in part:

715.09 [R-3] Seasonable Presentation

Affidavits or declarations under 37 CFR 1.131 must be timely presented in order to be admitted. Affidavits and declarations submitted under 37 CFR 1.131 and other evidence traversing rejections are considered timely if submitted:

- (A) prior to a final rejection;
- (B) before appeal in an application not having a final rejection;
- (C) after final rejection, but before or on the same date of filing an appeal, upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e); or
- (D) after the prosecution is closed (e.g., after a final rejection, after appeal, or after allowance) if applicant files the affidavit or other evidence with a request for continued examination (RCE) under 37 CFR 1.114 in a utility or plant application filed on or after June 8, 1995; or a continued prosecution application (CPA) under 37 CFR 1.53(d) in a design application.

In the advisory action mailed November 29, 2005, the examiner states that the declaration submitted on November 16, 2005 was untimely and would not be considered. Petitioner urges that good and sufficient reasons have been presented as to why the declaration is necessary and why it was not submitted earlier. The reasons given as to the timeliness requirements state that applicants inadvertently submitted an improper declaration earlier in the prosecution that covered a different species than that which is currently being prosecuted. While it is in the examiner's discretion as to whether or not to consider declarations filed after final rejection, in the instant case, it appears that the declaration should in fact be considered as a matter of fairness. Applicants did attempt to submit a declaration in a timely manner and promptly attempted to rectify the mistake by filing the declaration in question.

Accordingly, the petition for consideration of the declaration filed on November 16, 2005 is **GRANTED**. The application is being forwarded to the examiner for consideration of the declaration.

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